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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD MALLEY and THE STATE OF RHODE ISLAND,

Petitioners,

—v.—

JAMES R. BRIGGS and LOUISA BRIGGS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE RHODE ISLAND CIVIL LIBERTIES UNION AS *AMICI CURIAE*

JACK D. NOVIK
BURT NEUBORNE
American Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

STEVEN P. LOCKMAN
Counsel of Record
JONATHAN D. SCHWARTZ
Arnold & Porter
1200 New Hampshire Ave., N.W.
Washington, DC 20036
(202) 872-6782

LYNETTE LABINGER
Rhode Island Civil Liberties Union
344 Wickenden Street
Providence, RI 02903
(401) 421-9794

Counsel for Amici Curiae

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE RHODE ISLAND CIVIL LIBERTIES UNION AS AMICI CURIAE

INTEREST OF AMICI CURIAE

This brief is respectfully submitted on behalf of the American Civil Liberties Union and the Rhode Island Civil Liberties Union. This brief is filed with the consent of the parties; letters consenting to the filing of this brief have been lodged with the Clerk of this Court.

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting and preserving the liberties safeguarded by the Constitution and the Bill of Rights. The Rhode Island Civil Liberties Union is the Rhode Island affiliate of the ACLU. The prohibition against unreasonable searches and seizures contained in the Fourth Amendment is critically important among those safeguards. The ACLU and its affiliates have participated in many of the leading cases in which this

Court has given shape and content to the Fourth Amendment. In Mapp v. Ohio, 367 U.S. 643 (1961), the ACLU filed the only brief before the Court urging application of the exclusionary rule to the States, and was permitted by the Court to raise the point at oral argument. 367 U.S. at 646 n.3. The ACLU appeared as amicus curiae in United States v. Leon, ___ U.S. ___, 104 S. Ct. 3405 (1984), and appears again here because of its belief that the recognition of an absolute immunity for police officers who procure patently groundless arrest warrants would eliminate a significant deterrent to police conduct which violates the Fourth Amendment right of every citizen to be secure against unreasonable searches and seizures.

SUMMARY OF ARGUMENT

This case presents a question which is critical to the continued effectiveness

of 42 U.S.C. § 1983 ("Section 1983") as a vehicle through which citizens can seek redress for violations of their constitutional rights. That question is whether police officers should be liable when they procure arrest warrants on the basis of applications that clearly fail to provide probable cause. Amici submit that police officers submitting such patently groundless warrant applications are protected neither by qualified nor absolute immunity.

A. Petitioners' contention that a police officer submitting a patently groundless warrant application to a magistrate is protected by qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982), is without merit. In Harlow, the Court held that qualified immunity is not available as a defense where the conduct challenged is "objectively unreasonable" because it "violated clearly established

. . . constitutional rights of which a reasonable person would have known." 457 U.S. at 818. Since a patently groundless warrant has long been recognized to violate the Fourth Amendment, a police officer procuring such a warrant can claim no qualified immunity under Harlow.

This is precisely the teaching of the Court's decision in United States v. Leon, _____ U.S. _____, 104 S. Ct. 3405 (1984). In Leon, the Court, citing Harlow, held that a police officer's reliance on a magistrate's probable cause determination must be "objectively reasonable" in order to qualify for the "good faith" exception to the exclusionary rule. ____ U.S. at ____, 104 S. Ct. at 3421. In so holding, the Court stated that where a reasonably well-trained police officer would have known that the warrant he procured was not supported by probable cause, the officer's

conduct offends clearly established constitutional rights and is not "objectively reasonable." ____ U.S. at ____, 104 S. Ct. at 3423.

B. Petitioners have also failed to demonstrate that police officers, who have long possessed only a qualified immunity from liability, should be accorded absolute immunity when they procure patently groundless warrants. Absolute immunity in these circumstances would not promote any compelling public interest, and indeed, would frustrate the purpose of Congress in creating a private remedy for, and deterrent of, unconstitutional behavior.

Police officers are called upon daily to take actions which may threaten the right of individual citizens to be free from unreasonable searches and seizures without probable cause. The need for police officers to take heed of the probable cause

requirement is therefore particularly acute. A grant of absolute immunity will encourage police officers to proceed to magistrates with warrant applications that are patently groundless. Innocent persons victimized by such conduct will have no remedy, and guilty persons may escape prosecution entirely because the evidence secured will be suppressed under Leon.

These results will be avoided by rejection of absolute immunity in this case. There is no reason why police officers should be encouraged to depart from the flexible standard of probable cause when they submit applications for arrest warrants. Probable cause is a common-sense concept which already provides ample room for reasonable police errors. This hallowed constitutional precept will be deprived of its vitality if police officers are free to disregard it in the future.

ARGUMENT

A POLICE OFFICER WHO PROCURES A WARRANT IN AN OBJECTIVELY UNREASONABLE MANNER IS LIABLE FOR DAMAGES UNDER 42 U.S.C. § 1983

The question presented in the instant case is whether a police officer is subject to liability under 42 U.S.C. § 1983 ("Section 1983") for submitting a warrant application that clearly failed to provide probable cause and would result in the suppression of evidence under United States v. Leon, ____ U.S. ____, 104 S. Ct. 3405 (1984). Because there is no basis to recognize an immunity for such objectively unreasonable behavior, and because there are important reasons why the procurement of such patently groundless warrants should be subject to suit, this Court should hold that a police officer has no immunity defense for such conduct.

A. In the Absence of Absolute Immunity, A Police Officer Is Liable for Damages Under Section 1983 for Procuring a Patently Groundless Warrant

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court redefined the standard of qualified immunity available to many public officials.[1] The Court eliminated the need for a subjective inquiry into the mind of the official, and held that questions of qualified immunity would henceforth be determined solely on the basis of the "objective reasonableness of an official's conduct, as measured by reference to clearly established law."

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[1] Harlow was a suit brought directly under the Constitution against federal officials pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), rather than a suit under Section 1983 against state officials. This Court has held that it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." Butz v. Economou, 438 U.S. 478, 504 (1978); see also Davis v. Scherer, ____ U.S. ____, 104 S. Ct. 3012, 3020 n.12 (1984).

457 U.S. at 818. Under Harlow, the decisive issue with respect to qualified immunity is whether the conduct challenged "violated clearly established . . . constitutional rights of which a reasonable person would have known." Id. See Mitchell v. Forsyth, _____ U.S. _____, 105 S. Ct. 2806 (1985); Davis v. Scherer, ____ U.S. ____, 104 S. Ct. 3012 (1984).

In this case, Petitioner Malley prepared and obtained a patently groundless arrest warrant. In other words, any police officer should have known that, in these circumstances, the requested arrest warrant was clearly lacking in probable cause. For Petitioner to disregard that manifest deficiency and seek the arrest warrant nonetheless, violates "clearly established" constitutional law. Therefore, Petitioner

Malley is not immune from suit.[2]

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[2] Application of the constitutional standard for determining immunity in this warrant case is different than application of the standard in a warrantless arrest case.

This Court has often emphasized that it is constitutionally preferable for the police to obtain a warrant, particularly if there is any doubt about the sufficiency of probable cause. See Leon, supra. Therefore, when a police officer obtains a warrant, the officer is acting consistently with established law -- and is consequently protected by a qualified immunity -- except in those very limited instances, such as the instant case, in which the warrant application was patently without probable cause, in which case even seeking the warrant offends clearly established law. Cf. Leon, supra.

Where no warrant is sought, however, the law is clearly established that an officer may not make an arrest except upon probable cause. E.g., Dunaway v. New York, 442 U.S. 200 (1979). In such warrantless cases, therefore, the officer will be denied immunity whenever probable cause is lacking, even if the officer later claims that the sufficiency of probable cause was uncertain at the time. In such cases of uncertainty, the officer should obtain a warrant. Thus, if an officer elects to effect an arrest without a warrant in circumstances where probable cause was less than clear, and it is later determined that there was insufficient basis for the arrest, then the officer should not be granted immunity for that constitutional misjudgment.

[Footnote continued on following page]

Petitioners contend that a police officer's resort to a warrant is per se objectively reasonable under Harlow. (Petitioners' Brief, at 15, 35-38.) This argument was rejected in Leon, where the Court, citing Harlow, expressly ruled that not all conduct undertaken pursuant to a warrant is objectively reasonable. ____ U.S. at ____, 104 S. Ct. at 3421-22. Indeed, if the warrant in this case had produced incriminating evidence, such evidence would be excludable even after Leon precisely because Petitioner Malley "could not have harbored an objectively reasonable belief in the existence of probable cause." ____ U.S. at ____, 104 S. Ct. at 3423.

[Footnote 2 continued from preceding page]
This standard -- which would have the effect of immunizing an officer who obtains a warrant when probable cause is unclear, but would not immunize an officer acting without a warrant in the same circumstances -- encourages reliance on warrants, which of course was an underlying rationale of the decision in Leon, as well.

In Leon, this Court announced a "good faith" exception to the exclusionary rule set forth in Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961). The "good faith" exception permits the prosecution to introduce evidence which was obtained pursuant to a warrant issued without probable cause where the police officer seeking the warrant acted in "objectively reasonable" reliance on the magistrate's erroneous probable cause determination. ____ U.S. at ____, 104 S. Ct. at 3421. The Court held, however, that not all police conduct undertaken pursuant to a warrant satisfies the "objectively reasonable" standard. ___ U.S. at ___, 104 S. Ct. at 3421-22. Of particular significance here, the Court emphasized that there are instances in which a warrant application is "'so lacking in indicia of probable cause as to render

official belief in its existence entirely unreasonable.'" ____ U.S. at ____, 104 S. Ct. at 3422 (quoting Brown v. Illinois, 422 U.S. 590, 611 (1975)). See Nathanson v. United States, 290 U.S. 41 (1933) (suppressing evidence obtained by search warrant clearly lacking probable cause). In such instances, where the police officer has not "manifest[ed] objective good faith in relying on [the] warrant," ____ U.S. at ____, 104 S. Ct. at 3422, the "good faith" exception does not apply and any evidence obtained pursuant to the warrant may not be introduced in the prosecution's case-in-chief. ___ U.S. at ___, ___, 104 S. Ct. at 3421 n.23, 3423. Similarly, in such instances, the officer is not entitled to qualified immunity because securing such a patently groundless warrant violated "clearly established" constitutional rights.

The qualified immunity afforded by Harlow, as explicated in Leon, provides ample protection for police officers applying for warrants. A police officer will be protected by qualified immunity unless he submits a warrant application that clearly fails to provide probable cause. No additional protection is necessary. As we demonstrate below, patently groundless applications should not be granted the defense of absolute immunity by this Court.

B. Police Officers Do Not Have Absolute Immunity in Connection with Arrests of Private Citizens

In Butz v. Economou, 438 U.S. 478, 506 (1978), the Court stated that "[those] who seek absolute exempton from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires [it]." Petitioners cannot possibly meet this burden in this case.

1. Police Officers Have Always Enjoyed Only Qualified Immunity from Liability

This Court has never accorded absolute immunity to police officers for their conduct in criminal investigations. To the contrary, the Court held in Pierson v. Ray, 386 U.S. 547, 557 (1967), that police officers are entitled only to qualified immunity. In Pierson, a group of white and black clergymen attempting to use segregated facilities at an interstate bus terminal in Jackson, Mississippi were arrested and convicted under an ordinance later declared unconstitutional. The clergymen sued both the judge who decided their cases and the police officers who arrested them. The Court held that the judge was absolutely immune from liability. However, the Court found that the arresting officers were entitled only to qualified immunity. In

reaching this decision, the Court recognized that "[t]he common law has never granted police officers an absolute and unqualified immunity." 386 U.S. at 555; see Foley v. Connelie, 435 U.S. 291, 299 (1978); Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

The lower courts are in agreement that police officers do not have absolute immunity for their conduct in criminal investigations. As the Eighth Circuit recently stated in Ray v. Pickett, 734 F.2d 370, 374 (8th Cir. 1984): "Police officers have never been granted an absolute immunity in making the decision to arrest."

2. Qualified Immunity Will Deter Police Officers from Procuring Patently Groundless Warrants

This Court has denied absolute immunity to most federal and state officials, including the United States Attorney General, Mitchell v. Forsyth, ____ U.S. ____, 105

S. Ct. 2806 (1985); Presidential aides, Harlow v. Fitzgerald, 457 U.S. 800 (1982); members of the President's Cabinet and senior officials in federal agencies, Butz v. Economou, 438 U.S. 478 (1978); and a state governor and senior state executive officials, Scheuer v. Rhodes, 416 U.S. 232 (1974). The Court has recognized that absolute immunity should be avoided because it "provide[s] no redress to the injured citizen, nor [does] it in any degree deter . . . officials from committing constitutional wrongs." Butz, 438 U.S. at 505.[3]

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[3] Persons arrested pursuant to a patently groundless warrant will have no remedy whatsoever if police officers are granted absolute immunity for procuring such warrants. The state cannot be sued due to the Eleventh Amendment. See Ex Parte Young, 209 U.S. 123 (1908). The magistrate issuing the warrant is absolutely immune from civil suit. Pierson, 386 U.S. at 553-55. In addition, the municipality would not be liable unless petitioner Malley's actions were undertaken pursuant to official municipal policy or custom. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-91 (1978).

Recently, in Mitchell, ____ U.S. at ____, 105 S. Ct. at 2814, where the United States Attorney General was accorded only qualified immunity, the Court recognized that qualified immunity serves to deter unconstitutional acts:

> [The Attorney General] may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the Harlow standard: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights he should be made to hesitate . . . ." [Harlow, 457 U.S.] at 819. This is as true in matters of national security as in other field of governmental action. We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law. (Emphasis in original.)

Similarly, the public interest will not be jeopardized, but rather will be promoted,

if police officers are given incentives to avoid submitting patently groundless warrant applications.

Petitioners argue that police officers should be granted absolute immunity because they cannot be expected to understand the probable cause requirement of the Fourth Amendment. (Petitioners' Brief, at 32-34.) This argument is unfounded. Police officers are required "to have a reasonable knowledge of what the law prohibits." United States v. Leon, ____ U.S. at ____, 104 S. Ct. at 3420 n.20. Police officers confront the issue of probable cause daily, not only in determining whether they have adequate information to seek a warrant from a magistrate, but also in deciding whether activity they observe provides the basis for a warrantless arrest or search. See United States v. Watson, 423 U.S. 411 (1976). Police officers are well acquainted with the constitutional standard.

The probable cause standard is a practical and flexible concept requiring only reasonable conduct by police officers. This standard is well within the competence of police officers: "In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical, they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949). The probable cause standard provides ample room for reasonable errors by police officers. As this Court stated in Brinegar, 338 U.S. at 176:

> Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. (Emphasis added.)

In light of the flexibility afforded by the probable cause requirement, there is no need or justification for a rule of absolute immunity that would excuse police officers from paying attention to the requirements of the Fourth Amendment. A police officer's errors will not lead to liability if the mistakes are reasonable. The submission of a patently groundless warrant application, however, violates clearly established constitutional rights and should not be protected.

The Court has recognized that where the officials involved have the potential to engage in frequent and widespread violations of the rights of the public, absolute immunity poses particular dangers that must be avoided. See Butz v. Economou, 438 U.S. at 505. A significant deterrent to unconstitutional conduct will be removed

if police officers are informed by this Court that they can violate Fourth Amendment rights with impunity by the simple expedient of submitting a patently groundless warrant application to a magistrate.

3. Qualified Immunity Is Consistent With the Interests of Effective Law Enforcement

A rule of qualified immunity, under which police officers will be held liable when they engage in objectively unreasonable conduct, will also contribute to effective law enforcement. A police officer who faces the prospect of liability for submitting a patently groundless application is likely to investigate more thoroughly before he proceeds to a magistrate. Such investigation will either strengthen the prosecution's case by leading the police officer to additional facts sufficient to establish probable cause, or will indicate

that probable cause is not present. Both of these outcomes are consistent with effective law enforcement.

The incentive to investigate further will have another salutary effect. Under Leon, the exclusionary rule continues to require the suppression of evidence whenever a police officer submits a patently groundless warrant application. ____ U.S. at ____, 104 S. Ct. at 3421-22. To the extent that the denial of absolute immunity will discourage such applications, suppression will occur less often in the future and law enforcement will be enhanced. A grant of absolute immunity is likely to have precisely the opposite effect. Freedom from the possibility of liability will encourage police officers to submit "bare bones" affidavits. See Leon, ___ U.S. at ___, 104 S. Ct. at 3421 n.24. As a result, suppression under Leon will

occur more frequently and the interests of society in vigorous law enforcement will be impaired.

4. Since a Warrant Is Often Constitutionally Required, the Use of a Warrant Should Not Result in Absolute Immunity

Petitioners contend that the Court's preference for warrants should lead it to grant absolute immunity to police officers whenever they resort to warrants. (Petitioners' Brief, at 28-38.) This contention is without merit. While this Court has expressed its preference for warrants, e.g., United States v. Ventresca, 380 U.S. 102, 105-07 (1965), arrests in the home are required to be pursuant to warrant absent exigent circumstances. E.g., Payton v. New York, 445 U.S. 573 (1980). Respondents' arrest upon a warrant in this case, therefore, was not a matter of the police officer's choice, but rather a legal necessity.

Moreover, Petitioners' claim that the Court's preference for warrants should excuse objectively unreasonable reliance on patently groundless warrants was rejected by the Court in Leon. In Leon, the Court reiterated its preference for warrants, ____ U.S. at ____, 104 S. Ct. at 3416-17, but nonetheless refused to create a "good faith" exception to the exclusionary rule that would apply in all cases in which a police officer has obtained a warrant. Instead, the Court held that the officer's reliance on the magistrate's probable cause determination "must be objectively reasonable." ___ U.S. ___, 104 S. Ct. at 3421. Similarly, this Court should not exalt the preference for warrants over the requirement of probable cause in cases involving Section 1983.[4]

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[4] Although petitioners have now abandoned the "causation" argument that was advanced below and in their Petition for Certiorari, Leon also demonstrates that the magistrate's approval of the warrant application does

[Footnote continued on following page]

5. Police Officers Are Not Entitled to Absolute Immunity by Analogy to Prosecutors or Civilian Complainants at Common Law

Petitioners contend that a police officer obtaining an arrest warrant is entitled to absolute immunity by analogy to the absolute immunity prosecutors possess when initiating prosecutions and presenting the state's case. Imbler v. Pachtman, 424 U.S. 409, 431 (1976). (Petitioners' Brief, at 21-22.) Petitioner Malley,

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[Footnote 4 continued from preceding page] not break the chain of causation between the police officer's submission of the application and the resulting unconstitutional search or seizure. This result is consistent with common-law tort principles. As this Court held in Atchison &c. Railway Co. v. Calhoun, 213 U.S. 1, 7 (1909), if an individual's "misconduct . . . is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him . . . one is held responsible for all the consequences of his acts which . . . ought to have been foreseen by a reasonably prudent man."

however, was not acting as a prosecutor initiating a prosecution. Under Rhode Island law, police officers have no power to bring prosecutions for felony offenses. A grand jury indictment or a prosecutor's information is necessary to initiate a prosecution. R.I. Gen. Laws § 12-12-1.2.

Petitioner Malley was engaged in the routine police tasks involved in a criminal investigation. In Imbler, the Court left open the question of whether a prosecutor is entitled to absolute immunity for investigative activities or whether such activities would necessitate only "a good-faith defense comparable to the policeman's." 424 U.S. at 430 (citing Pierson, 386 U.S. at 557) (footnote omitted). More recently, in Harlow, 457 U.S. at 811 n.16, the Court noted that the lower courts have generally ruled that prosecutors do not enjoy absolute immunity for acts taken

in their investigative capacities. These courts have recognized that investigative actions do not involve decisions as sensitive as those involved in the initiation and presentation of prosecutions.

This Court has granted absolute immunity to prosecutors and other participants in court proceedings, including judges, Bradley v. Fisher, 13 Wall. 335 (1872); Pierson, supra, and witnesses, including police officers who serve as witnesses, Briscoe v. LaHue, 460 U.S. 325 (1983), largely because "[i]t is precisely the function of a judicial proceeding to determine where the truth lies . . . those involved in judicial proceedings should be given every encouragement to make a full disclosure of all pertinent information within their knowledge." Briscoe, 460 U.S. at 335 (quoting Imbler, 424 U.S. at

439 (White, J., concurring)).[5] This rationale cannot be stretched to encompass a police officer who submits a patently groundless application to a magistrate. Police officers, whose investigative activities take place outside of the courtroom, already have every incentive to disclose all the information in their possession in support of their warrant applications. Absolute immunity is not needed in order to insure full disclosure by police officers.

Petitioners' alternative analogy, that a police officer seeking a warrant is similar to a citizen making a complaint, is inapt because police officers, unlike

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[5] In addition, this Court has granted absolute immunity to the President of the United States, Nixon v. Fitzgerald, 457 U.S. 731 (1982), and legislators, Tenney v. Brandhove, 341 U.S. 367 (1951). These officials were able to demonstrate that they had complex discretionary responsibilities "so sensitive as to require a total shield from liability." Harlow, 457 U.S. at 813.

private citizens, are public officials who are required to abide by the requirements of the Constitution. These constitutional duties cannot be ignored by treating police officers as if they were private citizens who have no such duties.

Moreover, the comparison, even if apt, would support only a claim of qualified immunity. An arrest or prosecution procured by a civilian was not absolutely protected at common law. Civilian complainants were subject to liability for malicious prosecution if they acted in bad faith. E.g., Nesmith v. Alford, 318 F.2d 110, 121, 123-24 (5th Cir. 1963), cert. denied, 375 U.S. 975 (1964); see also Wolf v. Colorado, 338 U.S. 25, 30 n.1 (1949). In Harlow, this Court ruled that a subjective inquiry into an officials' state of mind is inappropriate under Section 1983. Accordingly, "bad faith" is established

for Section 1983 purposes whenever a public official, like Petitioner Malley, engages in "objectively unreasonable" conduct.

CONCLUSION

The procurement of a patently groundless warrant is not protected by either qualified or absolute immunity. Such flagrantly unconstitutional behavior leads to the suppression of evidence under Lecn and should also lead to the imposition of liability. The Fourth Amendment freedoms of every citizen will be seriously jeopardized if Section 1983 is removed as a deterrent to such conduct.

Respectfully submitted,

Jack D. Novik
Burt Neuborne
American Civil
Liberties Union
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Steven P. Lockman
Counsel of Record
Jonathan D. Schwartz
ARNOLD & PORTER
1200 N. Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6782

Lynette Labinger
Rhode Island Civil
Liberties Union
344 Wickenden Street
Providence, Rhode Island 02903
(401) 421-9794

Counsel for Amici Curiae